

Appendix F

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December 19, 2006

VIA FACSIMILE AND U.S. MAIL

Mr. John Odermatt
Supervisor Land Discharge Unit
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4353

Re: LDU: 06-0916.02:bmcDaniel

Dear Mr. Odermatt:

The following reply is made on behalf of the San Diego Unified School District ("School District") in response to the above-referenced Notice of Violation ("NOV"), dated December 6, 2006, for failure to comply with certain monitoring and reporting requirements of Order 97-11 for the Bell Junior High Landfill ("Landfill"). The School District disputes the basis for the violation set forth in the NOV because the Regional Board has concluded that the County of San Diego ("County"), not the School District, is the "operator" of the Landfill and because the Landfill is not a threat to groundwater at or surrounding the Landfill.

As explained below, the facts surrounding this NOV are similar to those surrounding the Waste Discharge Requirement ("WDR") fees imposed on the School District by the Regional Board pursuant to Order No. 97-11, which the School District has also disputed.

Factual Background

The County operated the Landfill as a disposal site for sanitary waste under a lease with the School District between 1961 and 1967. The County was the Landfill's only operator. The lease terminated on or about January 16, 1967. However, the County never took steps to formally close the Landfill.

Upon termination of the lease, and in preparation for the construction of a school, the School District imported additional fill, re-graded the site, and compacted the Landfill portion of the property. The School District also installed a drainage system. The School District

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constructed Bell Junior High School at the property in 1968. The school buildings were constructed on native soils east of the Landfill and the Landfill portion of the property has been used as a part of a playground.

On October 31, 2000, the Regional Board confirmed that the County was (and continues to be) the "operator" of the Landfill under the Water Code and directed the County to complete a SWAT investigation and report that included analytical results for "leachate and hazardous substances and/or wastes" from a minimum of four quarterly groundwater monitoring events. Despite the Regional Board's determination that the County is the operator of the Landfill and repeated requests made by the School District, the County has refused to install groundwater monitoring wells and perform a SWAT.

As a result of the County's refusal to comply with the Regional Board's directions, the School District, under protest, undertook the costly installation of the groundwater monitoring equipment and monitoring. An April 12, 2004 SWAT report prepared by the School District, which the Regional Board accepted on August 26, 2005, contains no evidence that the Landfill and any groundwater contamination are related.

On November 7, 2005, the School District requested that the Regional Board waive the WDR fees that were being imposed on the Landfill and that a refund of all fees paid to date be made pursuant to Water Code section 13260(e). On January 13, 2006, the Regional Board denied the request, without evidentiary support, simply concluding that WDR fees will continue to be imposed because "solid wastes within the unlined landfill are the most probable source of VOCs detected during the SWAT investigation" based on Regional Board staff's "experience with similar landfills."

The School District appealed the Regional Board's decision to the State Water Resources Control Board. The Office of Chief Counsel for the State Board refused to consider the appeal claiming that there is a technical distinction in requesting the "suspension" of the imposition of the fees and asking for the "rescission" of the fees. Though the School District disagrees with the State Board's position, on June 23, 2006, the School District re-filed its request with the Regional Board to "rescind" the imposition of all WDR fees imposed upon the Landfill. The School District also requested that all WDR fees, if not rescinded by the Regional Board, be imposed upon the County as the undisputed sole operator of the Landfill.

After waiting four months for a response from the Regional Board, on November 17, 2006, the School District sent another request for a response from the Regional Board. If no response is received, the School District will have no choice but to petition the State Board to review the Regional Board's failure to act pursuant to Water Code section 13320 and Title 23, section 2050 of the California Code of Regulations. A copy of the School District's November 17, 2006 correspondence to the Regional Board is enclosed.

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Semiannual Monitoring and Reporting Requirements at Issue in this NOV

The Regional Board's NOV, dated December 6, 2006, states the School District is in violation of Order No. 97-11 "for failure to submit semiannual monitoring reports" and Technical Change Order No. T-1 to Order No. 97-11 "for failure to submit electronic copies of semiannual monitoring reports." The NOV further states that the School District has failed to comply with the monitoring and reporting requirements for the Landfill set forth in E.8 of Order No. 97-11 (requiring the discharger to establish and maintain a groundwater detection monitoring program) and Sections D. and E. of Monitoring Reporting Program No. 97-11, as modified by Addendum 1 to Order No. 97-11 (requiring the submittal of groundwater monitoring reports to the Regional Board Executive Officer).

First, as explained above, there is no evidence to support the Regional Board's conclusion that the Landfill has contributed to the contamination of the groundwater at or surrounding the Landfill. Section C. of the Monitoring and Reporting Program for Order No. 97-11 states that the groundwater detection monitoring program for a landfill may be waived where a SWAT report has demonstrated that there has been no discharge of hazardous substances to ground water from the landfill. Since the SWAT investigation does not provide a conclusion for the source of groundwater contaminants, the Regional Board cannot continue to require the School District to monitor and report on the Landfill.

Second, there is no dispute that the operator of the Landfill is the County of San Diego. There is also no dispute that the Regional board has designated the County as the operator of the Landfill. Simply put, the Regional Board should have issued this NOV to the County, not the School District. However, the Regional Board has chosen not to enforce Order 97-11 against the County, which has spawned litigation between the County and the School District. It is not the responsibility of the School District to continue to pay fees and incur monitoring and reporting expenses for the Landfill when the Regional Board has determined that the County is the sole operator of the Landfill. The continual demands by the Regional Board upon the School District for the Landfill, while ignoring the County, is diverting much needed resources from the School District's students. The School District encourages the Regional Board to engage in discussions with the School District concerning these issues.

The School District also respectfully requests that the Regional Board waive the monitoring and reporting requirements forming the basis of the NOV dated December 6, 2006. In the alternative, the School District asks the Regional Board to suspend any further action on the NOV until a determination is made either by the Regional Board or the State Board (in response to the School District's petition for review of the Regional Board's failure to act on its request to rescind the WDR fees) regarding (1) the threat to groundwater at or surrounding the Landfill and (2) the County's responsibility for compliance with Order No. 97-11.

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We look forward to a response from the Regional Board on the School District's request. Unless the Regional Board states otherwise, the School District shall assume that no further action shall be taken on the December 6, 2006 NOV.

Please give me a call if you have any questions.

Very truly yours,

A handwritten signature in cursive script that reads "Cyndy Day-Wilson". The signature is written in dark ink and is positioned above the printed name.

Cyndy Day-Wilson
of BEST BEST & KRIEGER LLP

CDW:sb

cc: Jose Gonzales, Esq.
William Dos Santos